

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Wendell & Associates)	File No. BMAP-200001023ACF
)	
Request to Waive the Period to)	
Construct Unbuilt Station WKNJ(AM))	
Harriman, New York)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2002**Released: September 23, 2002**

By the Commission:

1. The Commission has before it an Application for Review filed by Wendell & Associates ("Wendell"), permittee of unbuilt broadcast station WKNJ(AM), Harriman, New York, and an opposition from Long Island Multimedia, LLC ("LIMM"), licensee of WLUX(AM), Islip, New York. Wendell requests additional construction time because terrorist attacks on September 11, 2001, allegedly prevented it from building prior to expiration of WKNJ's permit. It seeks review of staff denials which found little, if any, connection between the terrorist attacks and the permittee's failure to construct.¹ We affirm the staff action and deny review.

I. BACKGROUND

2. Wendell has had a permit to construct WKNJ(AM) for almost 14 years. The initial permit, granted on April 28, 1988, gave Wendell 18 months to construct a station serving the community of Lakeside, New Jersey. Because of local land use problems at the Lakeside site, Wendell received eight consecutive construction extensions through June 21, 1999. Under rules in effect at the time, extensions were granted for any circumstance beyond the permittee's control that prevented the timely construction of broadcast facilities, provided the permittee was taking steps to resolve the problem and to complete construction.² In granting the eighth extension, over LIMM's objection, the full Commission expressed concern about Wendell's continued failure to bring service to the public and cautioned that any future requests would be considered pursuant to new stricter standards that the Commission had recently adopted.³

3. In addition to eight extensions under the former rules, Wendell received two extensions as part of the transition to the new construction requirements. First, the Commission gave certain permittees, including Wendell, until December 21, 2000, to complete construction.⁴ Second, the staff gave permittees

¹ See 47 C.F.R. § 73.3598(b)(1).

² See 47 C.F.R. § 73.3534 (1998).

³ *Wendell & Associates*, 14 FCC Rcd 1671, 1683 (1998) ("*Lakeside*"). See also, *Streamlining of Mass Media Applications, Rules, and Processes, Report and Order*, 13 FCC Rcd 23056 (1998) ("*Streamlining R&O*"), *recon granted in part and denied in part*, 14 FCC Rcd 17525 (1999) ("*Streamlining MO&O*").

⁴ See *Streamlining MO&O*, 14 FCC Rcd at 17536.

that filed major modification applications in the AM Auction 32 filing window an additional year to obtain permits and to complete construction, *i.e.* until December 21, 2001.⁵ On October 23, 2000, Wendell filed a major change application in the Auction 32 window. Wendell proposed to collocate WKNJ(AM) at the transmitter site of WRKL(AM), New City, New York, which is licensed to an unrelated party.⁶ The application also proposed to change WKNJ(AM)'s community of license from Lakeside, New Jersey, to Harriman, New York. The staff granted the application on August 28, 2001, after Wendell corrected several defects in the application. The resulting modified permit carried an expiration date of December 21, 2001.

4. By letter dated November 16, 2001, Wendell notified the staff that it could not complete construction by the existing deadline, linking its request for more time to the events of September 11, 2001. According to Wendell, those events caused its New York area suppliers to delay work on WKNJ(AM) and to give priority to other projects, including September 11 clean-up efforts. LMM opposed the request for additional time, arguing that terrorism did not affect WKNJ(AM) significantly and that Wendell's failure to construct resulted instead from the permittee's longstanding lack of diligence.

5. The staff considered Wendell's request as one for waiver of the three-year broadcast construction period that became effective in 1999. That construction period (double the previous 18-month length of initial radio permits) is intended to give applicants sufficient time from grant of the initial permit to resolve all technical and land use issues, to seek and obtain, where necessary, permit modifications, and to complete station construction.⁷ The rules are designed to discourage "warehousing" of spectrum and to promote prompt introduction of service by placing on each permittee the burden of completing construction by a date certain.⁸

6. Under current procedures, the Commission does not extend broadcast construction permits. Instead, the three-year construction period is "tolled" for certain limited "encumbrances:" acts of God, administrative and judicial review of a permit grant, failure of a condition precedent on the permit, or judicial action related to necessary local, state or federal requirements.⁹ Once an encumbrance is resolved, tolling terminates, the running of the construction period resumes, and the staff calculates a revised construction deadline. The current standards provide for waivers of the three-year construction requirement in "rare and exceptional circumstances" beyond the permittee's control.¹⁰ Waivers are required to increase the construction period of any station that has received three or more unencumbered years to construct.¹¹

7. Because Wendell had received far in excess of three years to construct and made no

⁵ *Public Notice, AM Auction 32 Non-Mutually Exclusive Applications*, DA 00-2142 (Mass Media Bureau Sept. 22, 2000) at 3, *reprinted in part*, 15 FCC Rcd 18004 (2000) ("*Auction 32 Notice*").

⁶ Previously, in 1998, Wendell filed a similar application to use the WRKL(AM) site. The staff dismissed that application for failure to provide the required coverage to Lakeside, New Jersey.

⁷ See *Streamlining MO&O*, 14 FCC Rcd at 17539.

⁸ *Id.*

⁹ 47 C.F.R. § 73.3598(b).

¹⁰ *Streamlining MO&O*, 14 FCC Rcd at 17541. See generally, 47 U.S.C. § 319(b). *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied* 409 U.S. 1027 (1972).

¹¹ See *Texas Grace Communications*, 16 FCC Rcd 19167 (2001).

attempt to demonstrate tolling encumbrances, the staff considered its request as one for waiver. The staff indicated that vendor delays ordinarily would not be grounds for waiver, but that it would consider Wendell's request in depth because of the alleged connection to September 11. While accepting that the September 11, 2001, attacks were rare, exceptional, and beyond Wendell's control, the staff determined that there was little, if any, connection between those events and Wendell's inability to construct WKNJ(AM). In particular, the staff noted: (1) lack of damage at the WKNJ(AM) site, located 32 miles from the World Trade Center; (2) lack of pre-September 11 action by the permittee which, even absent the September 11 tragedy, made it unlikely that construction could be completed by December 21, 2001; (3) failure of the permittee to take timely steps to overcome its alleged post-September 11 problems, such as by replacing unavailable local crews with workers from other areas; (4) an engineering affidavit from L IMM indicating that no construction had begun as of three weeks prior to expiration; and (5) the permittee's request for a lengthy one-to-two year extension to address a problem that allegedly began only several months prior to expiration. The staff also noted L IMM's argument that Wendell's failure to construct for almost 14 years prevented L IMM from expanding the service area of its own Long Island station, which operates on a first-adjacent channel. For all of these reasons, the staff denied the waiver request on December 7, 2001.

8. In a December 18, 2001, petition for reconsideration Wendell provided the staff with new information. Wendell indicated that it had since hired a non-local engineer, had made some progress by completing surveys of the property and receiving partial shipments of equipment, and was proceeding with measurements. Wendell also reduced from two years to 56 days its estimate of time needed to complete construction and to negotiate with L IMM to allow expansion of L IMM's service area. L IMM responded that there were no ongoing negotiations and that Wendell's other construction actions were insignificant and evidenced a lack of diligence. The staff on December 21, 2001, stated that none of the new information altered its earlier conclusions, and affirmed denial of the waiver request.

II. DISCUSSION

A. Procedural Matters

9. As a preliminary matter, we must determine the nature of a December 21, 2001, submission styled as an "Engineering Statement and Data Documenting Progress." This document was received on the day that the WKNJ(AM) permit expired. Specifically, we have considered whether this *pro se* filing was an attempt to submit a timely, complete, and acceptable license application. We find, however, that the submission merely supplements Wendell's prior claim that its partial activities should be considered a "good faith effort" to construct WKNJ(AM). The submission apparently "crossed in the mail" with the staff's denial of reconsideration. We will include this information in the record.

10. Wendell filed its timely Application for Review on January 18, 2002, in the form of an untitled letter challenging various aspects of the staff's December 21, 2001, decision. Wendell also filed a third document, entitled "Application for Review by Full Commission," on January 29, 2002 (the "January Pleading"). On February 4, 2002, L IMM filed an Opposition in which it argued that Wendell's January Pleading is untimely and consists primarily of information already in the record. As Wendell submitted the January Pleading more than 30 days after public notice of the reconsideration decision, we dismiss it as untimely and unauthorized.¹²

¹² See 47 C.F.R. § 1.115(d). See also, *Public Notice, Broadcast Actions*, Report No 25140 (Dec. 28, 2001).

B. Length of Unencumbered Construction Period

11. Wendell argues on review for the first time that it has not received an unencumbered three-year construction period, and asks the Commission to consider its request as one for tolling as well as for waiver. This argument has several flaws. First, Wendell did not present tolling arguments to the staff and the Commission will not consider on review arguments upon which the staff has been afforded no opportunity to pass.¹³ Second, tolling requests must be made within 30 days of the pertinent tolling event not, as here, following the permit's expiration.¹⁴ Finally, Wendell's tolling argument - - that its vendors became busy after September 11 - - falls outside the enumerated tolling categories in Section 73.3598(b). Accordingly, we will review Wendell's request for additional time under the standards appropriate for waiver requests.

C. Review of Waiver Denial

1. Terrorism as the Cause of Non-Construction

12. Wendell argues that the staff erred in denying its waiver request. It repeats earlier arguments that the September 11 attacks on the World Trade Center were exceptional circumstances beyond its control, which delayed several vendors' work on WKNJ(AM). As a result of these vendor delays, Wendell claims to have missed its equipment manufacturer's deadline for submission of designs, making it impossible for Wendell to get phasing and diplexing equipment. Wendell maintains that it nevertheless acted in good faith to make as much progress as possible. It states on review that it was able to complete partial tower modifications, part of the filtering and phasing requirements, some field strength measurements, and preliminary site surveys.¹⁵ Wendell also claims to have equipment for a main studio and production studio, preliminary contracts with programming companies, and to have spent close to one million dollars on construction-related activities.¹⁶

¹³ 47 C.F.R. § 1.115(c). To receive tolling, a permittee must demonstrate that it could not build due to a Commission-recognized encumbrance and that the permittee has had, in total, less than three unencumbered years. *See* 47 C.F.R. § 73.3598. Wendell's November 16, 2001, and December 18, 2001, submissions provide no such analysis of the almost 14-year life of its permit, arguing instead for the amount of time Wendell believed necessary to construct. Although Wendell previously sought tolling on April 22, 1999, the staff dismissed that request in conjunction with Wendell's receipt of additional time as an AM Auction 32 applicant and Wendell did not seek review of this dismissal. In any event, with respect to many of Wendell's claimed difficulties, it has failed to demonstrate "encumbrances" within the meaning of our rules. This includes the eight and one-half years covered by the periods May 17, 1989 through November 9, 1995 (end of administrative review of permit grant until the staff ordered Wendell to cease activities that might have an adverse impact on a national historic landmark) and November 17, 1999 through December 21, 2001 (denial of judicial review of grant of permit extension through permit expiration).

¹⁴ 47 C.F.R. § 73.3598(c). Wendell did not present its waiver request until more than 30 days from the September 11, 2001, event on which it relied. However, as that filing was considered a waiver request, the timing provisions of Section 73.3598(c), which apply specifically to tolling, were inapplicable. *See generally* 47 C.F.R. § 73.3598(c) and (e).

¹⁵ Wendell told the staff that it had conducted "proof of performance measurements," which usually indicate an operational station. The staff reasonably concluded that the measurements related to collocated WRKL(AM), because absent an operational diplexing system, which the record indicates was not yet available, it would not be possible to conduct an acceptable proof of performance for WKNJ(AM).

¹⁶ At several other times Wendell stressed that towers were constructed and a ground system installed. However, these facilities were built previously by another licensee for the use of another station, WRKL(AM). Accordingly, the staff correctly rejected Wendell's attempt to link WRKL(AM)'s operational status to Wendell's construction efforts.

13. In opposition, LMM argues that the events of September 11 had very little to do with Wendell's failure to build a station. It attributes Wendell's predicament to a series of missteps by the permittee over the past 14 years including, most recently, its choice of a complicated technical plan that the permittee could not promptly implement. With respect to Wendell's professed progress and diligence, LMM maintains that Wendell has merely taken partial steps as a "delaying tactic" after having done very little to build the station for 14 years. LMM believes that the undocumented expenses Wendell claims to have incurred are generally unrelated to any efforts to construct at Harriman, the community identified in the station's permit, as most recently modified. Finally, LMM reiterates its view that Wendell's "spectrum hoarding" has prevented LMM's desired upgrades.¹⁷

14. We begin our analysis with an acknowledgement of the extraordinary nature of the September 11 terrorist attacks. Our inquiry, however, is limited to whether this particular broadcast permittee has justified a waiver of the construction rules by demonstrating a causal link between the attacks and its inability to construct. We conclude that the events of September 11, 2001, have not materially disrupted Wendell's ability to construct and, therefore, that a waiver of its construction deadline is unwarranted.

15. The alleged connection between the terrorist attacks and this permittee's inability to build is remote and weak. The attacks on the World Trade Center, 32 miles from WKNJ's site, did not directly prevent construction, and did not damage or impede access to the site. At most, Wendell has shown that the terrorist attacks may have generated new work for communications engineers and related vendors in the New York metropolitan area. Market changes and vendor problems, whatever their cause, are ordinary risks for which businesses should prudently plan, and would not generally form the basis for a waiver of our broadcast construction rules.

16. Wendell's claim that it could not proceed after September 11 is based primarily on the unavailability of two local companies that were to add "top hat" hardware to an existing tower of WRKL(AM), the station with which WKNJ(AM) would diplex, and to measure the impedance of the modified facility. Wendell asserts that these steps were necessary to permit an engineer to design diplexing and phasing systems and to submit the designs to an equipment manufacturer by the week of October 8, a manufacturer-imposed deadline.¹⁸ Wendell fails, however, to establish that these delays were due to anything more than poor planning, of which Wendell has been guilty several times over the past fourteen years.¹⁹

17. Although the permittee argues reliance on local companies to construct the top hat within the required time frame, there is no indication that it ever secured any contractual or other enforceable commitment from the companies to complete work by a date certain. Regardless of the terrorist attacks, it appears that these companies were always free to accept jobs from other sources and to give them priority over WKNJ(AM). Second, when the local companies in fact gave priority to other jobs, the

¹⁷ Immediately after the December 21, 2001, expiration of WKNJ's construction permit, LMM amended its pending modification application (File No. BMP-20011921AAT) to propose substantial facility improvements that conflict with the expired permit. On May 8, 2002, the staff granted that application conditioned on the outcome of this proceeding.

¹⁸ See generally *Waiver Request and attached letters from qServe Communications, Allen Tower Corporation, and Kintronics Laboratories*.

¹⁹ For example, Wendell's ignorance of the fact that its original Lakeside location was an environmentally sensitive former Superfund site resulted in lengthy delays. Similarly, Wendell did not consider that site's proximity to a National Historic Landmark, causing additional delays. Although these problems warranted extensions under our former rules, they could have been avoided altogether through reasonable research and planning.

permittee did not make any timely attempt to locate replacements. Even if we accept that there was a strong demand for communications engineering services in the New York metropolitan area after September 11, the staff correctly noted that Wendell did not consider the availability of vendors from outside that area. Significantly, once the staff raised the possibility of non-local vendors in denying a waiver, Wendell located a non-local substitute within days.²⁰ Wendell concurrently revised downward its expected completion time to about two months, significantly less than the one-to-two year period that it had estimated previously.²¹ Third, we do not accept Wendell's premise that no work could begin on design and manufacturing of its equipment without prior impedance measurements, a claim that the original staff decision accepted at face value. Although statements from two of Wendell's vendors would support a finding that such measurements were needed at some point in the design and manufacturing processes, they do not require a finding that absolutely no work could begin without those measurements.²² In our experience, the bulk of design and manufacturing of custom AM phasors and diplexors can proceed without exact impedance measurements. Alternatively, it is possible to order equipment with significant leeway built-in, and to tune the system during installation to respond to the particular conditions at the site. Accordingly, we conclude that Wendell's failure to complete station construction was not materially related to the events of September 11 and their aftermath.

2. Alleged Staff Responsibility for Insufficient Time to Construct

18. Wendell argues that, even absent the terrorist attacks, it deserves a waiver because staff actions deprived it of adequate time to construct. Wendell maintains that the staff refused to approve a December 1998 minor modification application, requiring instead that it submit a new application for a major modification. Wendell also states that after it filed the major modification application on October 23, 2000, in the Auction 32 window, the staff made numerous requests for additional information and took ten months to grant the application. According to Wendell, the staff knew since December 1998 that Wendell needed to change sites, but refused to grant authority for the move until August 28, 2001. The permittee further maintains that it received only a four-month period to implement its modified proposal in Harriman, which is far shorter than the 12-month period it believes was intended for AM Auction 32 applicants. Wendell argues that a four-month period, while perhaps sufficient for some AM modifications, was inadequate for WKNJ(AM), which it describes as technically complex. Because the station would operate directionally, use a new transmitter site, and diplex with another station, Wendell argues that completion in less than one year might have required unauthorized construction prior to issuance of the modified permit.

19. In opposition, LMM argues that the amount of time Wendell had to build results from Wendell's submission of defective applications. LMM emphasizes that the staff could not grant Wendell's 1998 minor modification application to move to the Harriman site because Wendell chose a site and a technical plan that could not provide city grade service to Lakeside, the station's original community of license. LMM states that Wendell's 2000 application had similar defects with respect to the new community and that Wendell did not correct the defects in a timely manner. According to LMM, the staff acted quickly once Wendell remedied the defects.

20. We reject Wendell's claims of staff error and insufficient time. Wendell filed its application to change its community of license to Harriman in the AM Auction 32 filing window, but the application was not mutually exclusive with any other application filed in that window. Thus, Wendell's

²⁰ See *Petition for Reconsideration at 1-2*.

²¹ *Id.* at 2.

²² See *Letters from VUR James, P.C and Kintronics Laboratories*.

application was not subject to any further auction procedures and could have been granted earlier, but for Wendell's omission of necessary information concerning its coverage of Harriman, and its failure to correct that defect promptly. The one-year additional time period that the staff granted for Auction 32 applicants was measured from the stations' existing expiration date, *i.e.*, from December 21, 2000. We reject Wendell's argument that the one-year period was meant to begin later, upon grant of the application submitted within the window, and that construction deadlines should thus be extended based on the amount of time an applicant takes to correct a patently defective filing.²³ Such policy is antithetical to each applicant's responsibility to file complete and grantable facility proposals, particularly in circumstances in which timely station construction is at issue. The staff, acting on delegated authority, properly afforded all AM Auction 32 applicants a uniform period of time so that applicants that were otherwise in danger of losing their permits would receive a chance to actively prosecute recently filed applications.²⁴ The staff properly extended the WKNJ construction period to December 21, 2001.

21. On the record, we conclude that Wendell is responsible for any delay in the processing of its application. An applicant that desires priority processing due to special circumstances, such as an impending construction deadline, can request expedited consideration.²⁵ The staff has developed procedures to give the highest priority to applicants in precisely the circumstances faced by Wendell. Wendell, however, did not request expedited treatment. An applicant can also, of course, facilitate prompt action by ensuring that the application is complete and in accordance with all requirements prior to submitting it to the Commission. Wendell's defective application omitted two required showings. Finally, if the staff discovers a defect, the applicant can minimize any resulting delay by providing all missing information promptly. The staff, on February 15, 2001, requested that Wendell correct two deficiencies within 30 days. Wendell corrected one deficiency within that time, but requested additional time to address the second. Wendell addressed the second matter (community coverage to Harriman) approximately four months later, on June 27, 2001, but its response still was incomplete. Specifically, Wendell proposed changes to WKNJ's facilities and coordinates, but did not submit a required map to demonstrate that such changes would provide adequate coverage to Harriman. The staff telephoned Wendell in July 2001 and received assurances that the map would be sent shortly. The staff placed the application on a July 27, 2001, public notice of acceptance, which began a statutory 30-day public notice period.²⁶ The staff granted the application on August 28, 2001, immediately following the public notice period. We therefore conclude that Wendell's argument of staff delay is meritless.

22. We also reject Wendell's claim that the Commission's prohibition of unauthorized construction prevented it from undertaking planning and rudimentary site preparation work prior to grant of the modification. The Commission previously advised Wendell regarding the extent to which construction-

²³ After our *Streamlining* decisions, permittees receive no additional time based on the pendency or grant of modification applications. *Streamlining R&O*, 13 FCC Rcd at 23090, *recon denied in relevant part, Streamlining MO&O* at 17538. See generally *Texas Grace Communications*, 16 FCC Rcd 19167 (2001). AM Auction 32 applicants filed for modification well after adoption of the new *Streamlining* procedures. Further, we note that AM city of license modifications are considered in conjunction with an applicant's technical proposals. AM city of license changes do not require lengthier notice and comment rulemaking proceedings, as is the case with changes to the FM Table of Allotments.

²⁴ See *Auction 32 Notice* at 3.

²⁵ See, e.g., *Expedited Processing of Applications Filed By Silent Stations*, 11 FCC Rcd 14356 (Mass Media Bureau 1996).

²⁶ See 47 U.S.C. § 309(b).

related activities can be taken consistent with our policies prior to obtaining a construction permit.²⁷ Preliminary preparation such as that done here - obtaining vendor information and prices, site surveys, digging trenches, pouring supports for guy wires, and conducting structural integrity tests on pre-existing towers - does not require prior Commission authorization.²⁸ Wendell concedes that it did not start this work until after the permit was granted.²⁹

23. Finally, contrary to Wendell's suggestion, the staff's recognition that "lack of pre-September 11 action by the permittee which, even absent that tragedy, made it unlikely to complete construction by December 21, 2001,"³⁰ does not support Wendell's claim of an inadequate construction period. The language merely expresses the staff's view that the permittee's failure to construct can be attributed largely to the permittee's own dilatory actions prior to September 11. As LMM has noted, Wendell held a permit to construct WKNJ(AM) for almost 14 years. This case amply demonstrates how permittees, unwilling or unable to construct broadcast facilities, harm the public by thwarting the efforts of other broadcasters who stand ready and willing to implement service improvements promptly. Wendell's inability to build in Harriman was a direct result of the permittee's failure to vigorously prosecute its modification application and to take reasonable steps to timely construct those facilities. Because Wendell did not demonstrate that rare and exceptional circumstances beyond its control prevented construction, the staff appropriately denied its waiver request.

24. Accordingly, IT IS ORDERED that the Application for Review filed by Wendell and Associates IS DENIED.

25. IT IS FURTHER ORDERED THAT the staff SHALL DELETE from the Commission's records call sign WKNJ(AM), which was forfeited upon permit expiration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁷ *Lakeside*, 14 FCC Rcd at 1679-80.

²⁸ *Id.*

²⁹ *Petition for Reconsideration* at 2.

³⁰ *Letter to Steve Wendell* at 2 (Aud.Ser.Div. Dec. 21, 2001) (denying reconsideration).